

1
2
3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 * * *

6 KEVIN GILL,

7 Petitioner,

Case No. 3:20-cv-00097-MMD-CLB

8 v.
9 ISIDRO BACA, et al.,

10 Respondents.

ORDER

11 **I. SUMMARY**

12 This is a habeas corpus action under 28 U.S.C. § 2254. The Court directed
13 Petitioner, Kevin Gill, to show cause why the Court should not dismiss the action as
14 untimely under 28 U.S.C. § 2244(d)(1). (ECF No. 3 (“OSC”).) Gill filed a response. (ECF
15 No. 11.) As further explained below, the Court will dismiss the action as untimely because
16 the Court finds Gill’s response unpersuasive.

17 **II. LEGAL STANDARD**

18 A 1-year period of limitation shall apply to an application for a writ of habeas corpus
19 by a person in custody pursuant to the judgment of a state court. The limitation period
20 shall run from the latest of—

21 (A) the date on which the judgment became final by the conclusion of
22 direct review or the expiration of the time for seeking such review;

23 (B) the date on which the impediment to filing an application created
24 by State action in violation of the Constitution or laws of the United
25 States is removed, if the applicant was prevented from filing by such
26 State action;

27 (C) the date on which the constitutional right asserted was initially
28 recognized by the Supreme Court, if the right has been newly
recognized by the Supreme Court and made retroactively applicable
to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims

1 presented could have been discovered through the exercise of due
2 diligence.

3 28 U.S.C. § 2244(d)(1).

4 **III. DISCUSSION**

5 **A. CORRECTION OF TWO ERRORS**

6 First, the Court's order to show cause has an error in its calculations. The Court
7 stated that the federal one-year limitation period expired at the end of May 12, 2014. (ECF
8 No. 3 at 6.) The correct date that the one-year period expired was May 12, 2015. This
9 correction does not affect the Court's conclusion that the action is untimely.

10 Second, the pages in Gill's response to the Court's order to show cause are not
11 consecutive. The correct order, using the ECF-generated page numbers, is 1 through 3,
12 5 through 7, 4, and 8. (ECF No. 11.)

13 **B. GILL'S RESPONSE TO THE OSC**

14 Gill's response does not address the issue of timeliness that the Court identified in
15 the OSC. At the start, he writes, "In the court[']s argument of Kevin Gill's petition stating in
16 the affirmance: '...The district court errored [sic] by not reaching the merits of the claims
17 raised on his habeas petition..."' (ECF No. 11 at 2.) Gill is quoting the decision of the
18 Nevada Court of Appeals to affirm the denial of his second state post-conviction habeas
19 corpus petition. (*Id.* at 18.) Gill then argues that he could not have invoked Rule 60 of the
20 Federal Rules of Civil Procedure because Rule 60 of the Nevada Rules of Civil Procedure
21 does not contain the provision that he needed. (*Id.* at 2.) This is in response to the Nevada
22 Court of Appeals holding that the Federal Rules of Civil Procedure are inapplicable in
23 Nevada state courts. (*Id.* at 20.) Then Gill argues that his petition "is not successive"
24 because he filed it with "*newly discovered evidence.*" (*Id.* at 2 (emphasis in the original).)

25 Gill appears to think the Court is reviewing the decision of the Nevada Court of
26 Appeals. Gill is incorrect. The Court does not sit as a court of review over the state courts.
27 The Court has determined that this federal petition is untimely under federal law. In the
28 OSC, the Court gave Gill the opportunity to explain why the Court should not dismiss this

1 action.

2 **C. GILL'S TIMELINESS ARGUMENTS**

3 Nonetheless, Gill's arguments as to why his second state petition was not
 4 successive can also be construed as arguments that he did not learn of the factual
 5 predicate of his claim until later—to delay the start of the federal one-year period under 28
 6 U.S.C. § 2244(d)(1)(D). The Court has considered his arguments as such, but the Court
 7 is not persuaded.

8 Gill also argues that the arresting officer, prosecutor, justice of the peace, and
 9 public defender were all confederates in denying his rights under the Fourth Amendment.
 10 He alleges that his initial arraignment occurred 72 hours after his arrest, while the
 11 maximum permissible time for an initial probable-cause determination is 48 hours. See
 12 *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Gill also alleges that these people
 13 violated *Powell v. Nevada*, 511 U.S. 79 (1994), which held that *McLaughlin* applies
 14 retroactively to cases not yet final at the time of *McLaughlin*'s decision.

15 The one-year period can run from “the date on which the factual predicate of the
 16 claim or claims presented could have been discovered through the exercise of due
 17 diligence.” 28 U.S.C. § 2244(d)(1)(D). “The ‘due diligence’ clock starts ticking when a
 18 person knows or through diligence could discover the vital facts, regardless of when their
 19 legal significance is actually discovered.” *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir.
 20 2012).

21 Gill has not presented any newly discovered evidence. He was present when he
 22 was arrested. He was present when he was arraigned three days later. Thus, he had
 23 personal knowledge of the facts underlying his *McLaughlin* claim as they happened, and
 24 they happened before his judgment of conviction became final. The one thing Gill might
 25 have discovered years later was the legal significance of the time between arrest and initial
 26 arraignment. However, as *Ford* holds, discovery of legal significance does not affect the
 27 start of the one-year period because Gill knew of the facts years earlier. The one-year
 28 period began after Gill's judgment of conviction became final. See 28 U.S.C.

1 § 2244(d)(1)(A).

2 In sum, the Court's conclusion remains unchanged. Gill's judgment of conviction
 3 became final at the end of February 16, 2009. Between that date and September 16, 2009,
 4 when he filed his first state habeas corpus petition, 211 non-tolled days passed. The time
 5 spent on the first state habeas corpus petition was tolled under 28 U.S.C. § 2244(d)(2).
 6 The first state habeas corpus petition concluded with the issuance of the remittitur on
 7 December 9, 2014. Gill had nothing else that qualified for tolling that was pending in the
 8 state courts during the remaining federal one-year period. The federal one-year period
 9 expired, with the correction noted above, at the end of May 12, 2015.

10 Moreover, Gill's two prior federal habeas corpus petitions did not toll the one-year
 11 period because they were ineligible for tolling under § 2244(d)(2). See *Duncan v. Walker*,
 12 533 U.S. 167, 181-82 (2001).

13 In addition, Gill's second state habeas corpus petition did not toll the one-year
 14 period for two reasons. First, the state courts determined that the petition was untimely.
 15 An untimely state petition does not qualify for tolling under § 2244(d)(2). See *Pace v.*
 16 *DiGuglielmo*, 544 U.S. 408, 417 (2005). Second, the one-year period had already expired
 17 more than three years before Gill filed his second state petition. No time was left for tolling.
 18 See *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

19 Gill dated his current federal habeas corpus petition February 10, 2020. The Court
 20 received it on February 11, 2020. This was more than four and a half years after the one-
 21 year period had expired. Thus, the petition is untimely, and the Court dismisses it.

22 **D. CERTIFICATE OF APPEALABILITY**

23 To appeal the denial of a petition for a writ of habeas corpus, Petitioner must obtain
 24 a certificate of appealability, after making a "substantial showing of the denial of a
 25 constitutional right." 28 U.S.C. §2253(c).

26 Where a district court has rejected the constitutional claims on the merits,
 27 the showing required to satisfy §2253(c) is straightforward: The petitioner
 28 must demonstrate that reasonable jurists would find the district court's
 assessment of the constitutional claims debatable or wrong. The issue
 becomes somewhat more complicated where, as here, the district court

1 dismisses the petition based on procedural grounds. We hold as follows:
2 When the district court denies a habeas petition on procedural grounds
3 without reaching the prisoner's underlying constitutional claim, a COA
4 should issue when the prisoner shows, at least, that jurists of reason would
find it debatable whether the petition states a valid claim of the denial of a
constitutional right and that jurists of reason would find it debatable whether
the district court was correct in its procedural ruling.

5 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074,
6 1077-79 (9th Cir. 2000). Gill's sole claim in his petition is that he received a judicial
7 determination of probable cause 72 hours after his warrantless arrest, in violation of
8 *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Gill was arrested on May 11, 2004.
9 (ECF No. 4 at 29.) A justice of the peace reviewed the probable-cause affidavit and found
10 probable cause on May 12, 2004. (ECF No. 4 at 31.) Thus, Gill received a prompt
11 determination of probable cause. Gill does not state a valid claim regarding the denial of
12 a constitutional right, and reasonable jurists would not find that determination debatable.
13 Reasonable jurists also would not find debatable the Court's determination that Gill's
14 petition is untimely. The Court will not issue a certificate of appealability.

15 **IV. CONCLUSION**

16 It is therefore ordered that this action is dismissed with prejudice because it is
17 untimely.

18 It is further ordered that a certificate of appealability will not issue.

19 The Clerk of Court is directed to enter judgment accordingly and close this case.

20 DATED THIS 20th Day of August 2020.

21
22
23 
MIRANDA M. DU
24 CHIEF UNITED STATES DISTRICT JUDGE
25
26
27
28